Supreme Court, U.S.
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No. 93-483

In The

# Supreme Court of the United States

October Term, 1993

WILLIAM WARFEL, JR. and SUSAN WARFEL,

*Petitioners,*

vs.

ROBERT W. BRADY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT JOHN BRADY,

*Respondent.*

**Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland**

## BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES

The parties involved in the lower court were Plaintiffs:

1. William Warfel, Jr. and Susan Warfel, as Personal Representatives of the Estate of William Warfel, deceased.
2. William Warfel Jr., as son of the deceased, William Warfel.
3. Susan Warfel as daughter of the deceased, William Warfel.

and Defendant:

4. Robert W. Brady, as Personal Representative of the Estate of Robert John Brady.

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## COUNTER STATEMENT OF FACTS

Petitioners' lawsuit against the Estate of Robert John Brady was dismissed by the Circuit Court of Anne Arundel County because the Petitioners failed to present their claim within nine (9) months of Robert John Brady's death, as required by Section 8-103(a)(1), Estates and Trusts Article of the Maryland Annotated Code. The nine-month period expired on August 24, 1990 without the presentation of Petitioners' claim. The Respondent did not mail or otherwise deliver written notice of the time bar to the Petitioners. The Respondent did publish such notice on April 25, 1990, May 2, 1990, and May 9, 1990. (Pet. App. at 5a).

Petitioners appealed the Circuit Court's dismissal to the Court of Special Appeals of Maryland. The appellate court found no evidence suggesting that the Personal Representative was aware of Petitioners' claim before being served with Petitioners' Amended Complaint on January 16, 1991. (Pet. App. at 13a and 14a). In addition, the appellate court ruled that under the circumstances of this case, the Petitioners' claim was not reasonably ascertainable by the Personal Representative. (Pet. App. at 11a). As a result of these findings, the Court of Special Appeals concluded that there was nothing in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), which would require the Respondent to provide Petitioners with actual notice in order to terminate their claim against the estate. (Pet. App. at 11a). The Appellate Court went on to say that, in any event, they had recently held that this nonclaim statute, which was enacted by the legislature in response to *Tulsa*, was not unconstitutional. (Pet. App. at 11a).

The Petitioners assert that the Maryland nonclaim statute violates the Due Process Clause because it allowed for the termination of their claim without actual notice.

## SUMMARY OF ARGUMENT – REASONS FOR DENYING WRIT

I. The Maryland nonclaim statute, Section 8-103 of the Estates and Trusts Article of the Maryland Annotated Code, does not involve significant state action and, therefore, does not implicate due process concerns.

II. Even if Section 8-103(a)(2) of the Maryland nonclaim statute, involved sufficient state action to implicate due process; it is triggered by actual notice and, therefore, does not violate the Due Process Clause.

III. Petitioners lack standing to contest the constitutionality of Section 8-103(a)(2) of the Maryland Annotated Code, where it played no part in the dismissal of their case.

IV. Where the Maryland Court of Special Appeals determined that Petitioners' claim was not known or reasonably ascertainable by the Personal Representative, its termination without actual notice did not violate due process.

V. Due process does not require actual notice to those with mere conjectural claims.

## ARGUMENT

### I.

### THE MARYLAND NONCLAIM STATUTE IS SELF-EXECUTING.

The Petitioners rely on the case of *Tulsa Professional Collection Services, Inc. v. Pope, Executrix of the Estate of Pope*, 485 U.S. 478 (1988), to support their contention that the Maryland nonclaim statute violates due process. Their reliance is misplaced.

The *Tulsa* case involved an Oklahoma nonclaim statute which was triggered by legal proceedings and which required only notice by publication to terminate a claim. The Court in *Tulsa* held that where legal proceedings trigger the nonclaim statute, there is sufficient state action to implicate due process concerns. *Id.* at 487 and 491. The Court went on to say that if a creditor's identity was known or reasonably ascertainable, then the Due Process Clause requires that the creditor be given "notice by mail or other means as certain to ensure actual notice". *Id.* at 491.

The Maryland nonclaim statute bears little, if any, resemblance to the Oklahoma statute involved in *Tulsa*. In fact, the Maryland statute was enacted as a result of the *Tulsa* decision. Its constitutionality was upheld by the Maryland Court of Special Appeals in two cases. (Pet. App. at 11a). See *Ohio Casualty Ins. Co. v. Hallowell*, 94 Md. App. 444, 617 A.2d 1134 (1993); see also *Lampton v. LaHood*, 94 Md. App. 461, 617 A.2d 1142 (1993).

The Maryland statute has two parts. The first part of the Maryland nonclaim statute, Section 8-103(a)(1), provides that the limitation period runs automatically from the time of the decedent's death. Unlike the Oklahoma statute, it is self-executing in that death commences the running of the period and the passing of that period, regardless of state action. Due process concerns are not implicated by such a self-executing limitation statute. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

The second part of the Maryland nonclaim statute, Section 8-103(a)(2), allows the personal representative to shorten the nine-month period by mailing or otherwise delivering written notice to the creditor. It too differs from the Oklahoma statute. Specifically, it is not triggered by action mandated by state legal proceedings. Rather, the personal representative has the option of shortening the nine-month period by mailing or otherwise delivering written notice. If the personal representative elects not to take this action, then the shortened period does not come into play. As a result of this difference, the amount of state action involved in the triggering of 8-103(a)(2), if any, falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

## II.

## SECTION 8-103(a)(2) OF THE MARYLAND NONCLAIM STATUTE COMPLIES WITH THE DUE PROCESS CLAUSE.

Even if Section 8-103(a)(2) involves sufficient state action to implicate due process concerns, there is no due

process violation where the section is triggered by the mailing or otherwise delivering of written notice to the creditor. Mailing or delivering written notice is actual notice for due process purposes. *Tulsa, supra,* at 490 and 491. Where there is actual notice, there is no due process violation.

## III.

## PETITIONERS LACK STANDING TO CONTEST THE CONSTITUTIONALITY OF SECTION 8-103(a)(2) OF THE MARYLAND NONCLAIM STATUTE.

The Petitioners concentrate on Section 8-103(a)(2) to show a due process violation. Their argument is meritless. First, Section 8-103(a)(2) played no part in the dismissal of the Petitioners' claim. Therefore, Petitioners have no standing to challenge its constitutionality.

Secondly, Petitioners' version of Section 8-103(a)(2) bears no resemblance to the actual statute. Specifically, the Petitioners state that Section 8-103(a)(2) is triggered by the "posting of notice," rather than by the mailing or otherwise delivering of written notice. (Pet. at 7). Furthermore, Petitioners conclude that Section 8-103(a)(2) was triggered in their case when notice was "published" in the Maryland Gazette. (Pet. at 8). Obviously, any argument based on such a misreading of the statute is totally meaningless.

## IV.

## THE DUE PROCESS CLAUSE DOES NOT REQUIRE ACTUAL NOTICE TO UNKNOWN CREDITORS OR THOSE WHOSE CLAIMS CANNOT BE ASCERTAINED THROUGH REASONABLY DILIGENT EFFORTS.

The Maryland Court of Special Appeals found no evidence suggesting that Respondent was aware of Petitioners' Complaint before being served with Petitioners' Amended Complaint on January 16, 1991 (Pet. App. at 13a and 14a). In addition, the Court of Special Appeals concluded that the Respondent could not have ascertained the Petitioners' claim through reasonably diligent efforts (Pet. App. at 11a).

Where, as in this case, the claim was neither known nor reasonably ascertainable by the Personal Representative, its termination without actual notice does not violate due process. For creditors who are not reasonably ascertainable, publication notice can suffice. *Tulsa, supra,* at 490.

## V.

## DUE PROCESS DOES NOT REQUIRE ACTUAL NOTICE TO THOSE WITH MERE CONJECTURAL CLAIMS.

Everyone who may conceivably have a claim is not properly considered a creditor entitled to actual notice under the Due Process Clause. It is reasonable to dispense with actual notice to those with mere conjectural claims. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Clearly, Petitioners' claim against the

Estate of Robert John Brady was not of a definite or liquidated nature. It was based in tort and was, at best, conjectural. Under these circumstances, even where due process concerns are implicated, actual notice is not required and publication will suffice.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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